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Nagandran a/l Kalianna Gaundar (t/a Raju Restoren) v Melinda Alison Monteiro & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4–23–42 OF 2003
ROSILAH YOP JC
28 APRIL 2011

Tort — Defamation — Libel — Alleged libel in email — Maker of email not called to testify — Person who allegedly downloaded and gave hard copy of email to plaintiff also not called as witness — Whether contents of email hearsay and inadmissible — Whether identity of sender of email proved — Whether plaintiff proved basic elements of defamation

The plaintiff sued the defendants for defamation on the basis statements contained in an email allegedly made by the first defendant and published on the internet. The first defendant was employed by the second defendant. It was disputed that the email was sent by the first defendant and was published to a third party. Neither the maker of the email nor the person who allegedly downloaded and gave a hard copy of the email to the plaintiff were called to testify. The email also did not identify who the sender of it was although during 'without prejudice' negotiations to settle the dispute the first defendant allegedly admitted sending the email to a third party.

Held, dismissing the claim with costs:

(1) The plaintiff had failed to prove the three elements to an action for defamation, namely, that the words complained of were defamatory of the plaintiff, that they referred to the plaintiff and that they were published to a third party (see paras 3, 46 & 47).

(2) The email, marked ID3, was the most crucial document relied on by the plaintiff to prove his claim (see para 10). Yet the maker of the email was not called as a witness (see para 11).

(3) The plaintiff's evidence as far as ID3 was concerned was hearsay as he did not have personal knowledge regarding the transactions of the email. The plaintiff said ID3 was given to him by Teh Yoong Yang, who was the backbone of the plaintiff's case, but he was not called to testify (see paras 16 & 17).

(4) The evidence of Teh Yoong Yang was critical for the plaintiff to establish that it was Teh who gave ID3 to him and that it was Teh who downloaded

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the offending email from the computer and gave it to the plaintiff. There was no evidence whether it was the same email tendered in court (see paras 19 & 20).

(5) The court rejected ID3 and all oral testimony related to it as evidence on the ground it was hearsay as Teh Yoong Yang was not called to testify (see paras 23 & 24). Consequently, there was no evidence to show that the contents of ID3 were referable to the plaintiff (see para 28).

(6) ID3 did not contain any information about who the sender of it was. In the absence of any marks on the email to identify its sender the plaintiff had to prove that the first defendant did in fact send the email (see para 32).

(7) The letter from Bank of America revealed the first defendant's email address and that ID3 was sent from that address. However there was no evidence that the email referred to in the letter was the same email as ID3. There was doubt as to which email was sent out from the first defendant's email address. Since ID3 was not admitted as evidence and there was doubt as to who was the sender of ID3 the plaintiff had failed to prove the defendants published the words complained of to a third party (see para 33).

(8) The plaintiff had adduced evidence that during negotiations for settlement of the dispute the first defendant had admitted sending the email to a third party (see para 34). Though the admissions were not labeled 'without prejudice' they were intended to be so and hence were inadmissible (see paras 40 & 41). The plaintiff himself stated that negotiations were made on a without prejudice basis and were privileged (see para 43).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan-defendan bagi fitnah atas alasan kenyataan-kenyataan yang terkandung di dalam emel yang didakwa dibuat oleh defendan pertama dan diterbitkan di dalam internet. Defendan pertama adalah pekerja defendan kedua. Dipertikaikan bahawa emel tersebut telah dihantar oleh defendan pertama dan diterbitkan kepada pihak ketiga. Pengarang emel tersebut mahupun orang yang didakwa memuat turunnya dan memberi salinan bercetak emel tersebut kepada plaintif tidak dipanggil untuk memberi keterangan. emel tersebut juga tidak dikenalpasti siapa penghantarnya walaupun adanya perundingan 'tanpa prejudis' untuk menyelesaikan pertikaian defendan pertama yang didakwa mengaku menghantar emel tersebut kepada pihak ketiga.

Diputuskan, menolak tuntutan dengan kos:

(1) Plaintif gagal untuk membuktikan tiga elemen untuk tindakan bagi

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fitnah, khasnya, bahawa perkataan-perkataan yang diadukan adalah berunsur fitnah terhadap plaintif dan merujuk kepada plaintif dan diterbitkan oleh pihak ketiga (lihat perenggan 3, 46 & 47). A

(2) emel tersebut, bertanda ID3, adalah dokumen terpenting yang disandarkan oleh plaintif untuk membuktikan tuntutannya. Namun, pengarang emel tersebut tidak dipanggil sebagai saksi (lihat perenggan 10 & 11). B

(3) Keterangan plaintif berkenaan ID3 adalah dengar cakap kerana dia tiada pengetahuan peribadi mengenai transaksi emel tersebut. Plaintif mengatakan bahawa ID3 diberikan kepadanya oleh Teh Yoong Tang, yang menjadi tulang belakang kes plaintif, tetapi dia tidak dipanggil untuk memberi keterangan (lihat perenggan 16 & 17). C

(4) Pembuktian Teh Yoong Yang adalah penting bagi plaintif untuk mewujudkan bahawa Teh telah memberi ID3 dan bahawa Teh telah memuat turun emel yang menyinggung tersebut daripada komputer dan memberinya kepada plaintif. Tiada bukti sama ada emel yang sama dikemukakan di dalam mahkamah (lihat perenggan 19 & 20). D

(5) Mahkamah menolak ID3 dan keterangan lisan berkaitan dengannya sebagai bukti atas alasan ia adalah dengar cakap memandangkan Teh Yoong Yang tidak dipanggil untuk memberi keterangan. Akibatnya, tiada bukti untuk menunjukkan bahawa kandungan ID3 merujuk kepada plaintif (lihat perenggan 23-24 & 28). E

(6) ID3 tidak mengandungi sebarang maklumat mengenai siapa penghantarnya. Dengan ketiadaan sebarang tanda-tanda pada emel untuk mengenalpasti siapa penghantarnya, plaintif haruslah membuktikan bahawa defendan pertama sebenarnya telah menghantar emel tersebut (lihat perenggan 32) F

(7) Surat daripada Bank of America telah mendedahkan alamat emel defendan pertama dan ID3 telah dihantar melalui alamat emel tersebut. Walau bagaimanapun, tiada bukti bahawa emel yang dirujuk di dalam surat itu adalah emel yang sama dengan ID3. Tiada keraguan mengenai emel manakah yang dihantar melalui alamat emel defendan pertama. Memandangkan ID3 tidak diterima sebagai bukti dan tiada keraguan mengenai siapa penghantar ID3, plaintif gagal membuktikan defendan-defendan menerbitkan perkataan-perkataan yang didakwa kepada pihak ketiga (lihat perenggan 33). G H

(8) Plaintif telah mengemukakan bukti bahawa ketika perundingan untuk penyelesaian pertikaian diadakan, defendan pertama telah mengaku menghantar emel kepada pihak ketiga. Walaupun pengakuan tersebut tidak dianggap sebagai 'tanpa prejudis' ia adalah dimaksudkan sebegitu I

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dan walaupun tidak diterima. Plaintif sendiri menyatakan bahawa perundingan dibuat atas dasar 'tanpa prejudis' dan keistimewaan.]

Cases referred to

Abdul Rahman Talib v Seenivasagam & Anor [1966] 2 MLJ 66; [1966] 1 LNS 5, FC (refd)

Allied Bank (Malaysia) Bhd v Yau Jiok Hua [1998] 6 CLJ 1; [1998] 2 CLJ 33, HC (folld)

Ayob bin Saud v TS Sambanthanmurthi [1989] 1 MLJ 315; [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321, HC (refd)

Cuffs v Head and Another [1984] 1 AER 597 (refd)

Dato' Musa Hitam v SH Alattas & Ors [1991] 2 CLJ 487 (Rep); [1991] 1 CLJ 314, HC (refd)

EON Bank Berhad v Cepad Group Sdn Bhd & Ors [2006] 4 MLJ 362; [2006] 1 LNS 246, HC (refd)

Hebditch v Macilwaine and others [1894] 2 QB 54, CA (refd)

Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd [1993] 1 MLJ 408, HC (refd)

Jinro (HK) Limited, Re [2002] 4 HKC 90 (refd)

Knupffer v London Express Newspaper, Limited [1944] AC 116, HL (refd)

Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 17; [1981] 1 LNS 95, FC (refd)

Myers v Director of Public Prosecutions [1964] 2 All ER 881, HL (refd)

Oh Kuang Liang v Associated Wood Ind Sdn Bhd [1995] 4 MLJ 390; [1995] 2 CLJ 961, HC (refd)

PP v Datuk Haji Harun bin Haji Idris & ors [1977] 1 MLJ 180 (refd)

Progressive Insurance Sdn Bhd v RM Insurance Underwriting Agency Sdn Bhd & Ors [2009] MLJU 649; [2003] 5 CLJ 321, HC (folld)

S Pakianathan v Jenni Ibrahim [1988] 2 MLJ 173; [1988] 1 CLJ 771; [1988] 1 CLJ 233, SC (refd)

Subramaniam a/l Paramasivam v Courts Mammoth Bhd & Anor [2010] 9 MLJ 363; [2010] 1 LNS 904, HC (refd)

Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 2 MLJ 56; [1973] 1 LNS 146 (refd)

Teper v Reginam [1952] 2 All ER 447, PC (refd)

Legislation referred to

Companies Act 1965

D Kalai (Kalai & Partners) for the plaintiff.
Ng Kam Thai (Kadir Andri Aidham & Partners) for the first defendant.
Ganesan Nethi (Tommy Thomas) for the second defendant.

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Rosilah Yop JC:

BRIEF FACTS

[1] The plaintiff is suing the defendants for defamation as a result of the alleged statements made by the first defendant published in the internet on 5 November 2001. The plaintiff is the sole proprietor of a restaurant known as Raju Restaurant. The first defendant is the employee of the second defendant. The second defendant is a company incorporated under the Companies Act 1965.

ALLEGED DEFAMATORY STATEMENTS

[2] The alleged defamatory statements are as set out in para 6(b) of the statement of claim. The statements are in the form of an email and marked as ID3.

THE LAW

[3] In *Progressive Insurance Sdn Bhd v RM Insurance Underwriting Agency Sdn Bhd & Ors* [2009] MLJU 649; [2003] 5 CLJ 321, Ramly Ali J has referred to the decision by Mohamed Dzaiddin J (as he then was) in the case of *Ayob bin Saud v TS Sambanthanmurthi lain* [1989] 1 MLJ 315; [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 as having clearly laid down the necessary burden in establishing a claim for libel. In that case, His Lordship Mohamed Dzaiddin J had stated the law to be as follows:

> In our law on libel, which is governed by the Defamation Act 1957, the burden of proof lies on the plaintiff to show:
>
> (i) the words are defamatory;
>
> (ii) the words refer to the plaintiff; and
>
> (iii) the words were published.

[4] The plaintiff must first discharge the onus of proving that the statements complained of were defamatory of the plaintiff. Only upon the plaintiff establishing this would the burden then rest on both defendants to prove that those statements are in substance and in fact true (See Supreme Court decisions in *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173; [1988] 1 CLJ 771; [1988] 1 CLJ (Rep) 233; and *Abdul Rahman Talib v Seenivasagam & Anor* [1966] 2 MLJ 66; [1966] 1 LNS 5).

[5] Only if these elements are established, then it can be said that prima facie

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the words are defamatory of the plaintiff. Only then would it become necessary to consider the defences and the plaintiffs answers thereto.

WERE THE STATEMENTS DEFAMATORY OF THE PLAINTIFF?

[6] In this case it was established that the statements complained of was in the email, ID3, refers to the plaintiff's business since the plaintiff was referred to by his business name.

[7] It is disputed that the email, ID3, was sent out by first defendant and was published to the third person. So the first issue was whether the statements are defamatory of the plaintiff? There are a long line of authorities on what test to be applied to determine whether the statements are defamatory or not. In *Syed Husin Ali v Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 2 MLJ 56; [1973] 1 LNS 146 wherein Mohamed Azmi J (as His Lordship then was) states:

> Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.

[8] In *Dato' Musa Hitam v SH Alattas & Ors* [1991] 2 CLJ 487 (Rep); [1991] 1 CLJ 314, under held (1), Lim Beng Choon J held:

> The test as to whether the words complained of were defamatory or not is whether, under the circumstances in which the writing was published, reasonable men to whom the publication was made would be likely to understand it in a libelous sense. The test is objective and the question is what the words mean as word and not what the defendant in his own mind meant by them or intended to mean. The fact that the person to whom the words were published might not believe them to be true is irrelevant and does not affect the right of action although it might affect the question of damages.

ADMISSIBILITY OF ID3

[9] Before I proceed to consider the issues raised, it is pertinent for me to keep in mind the principles of law governing the admissibility of evidence. In particular this relates to document marked ID3 in this action.

[10] The crux of the claim is found at para 6 of the statement of claim. It is pertinent to note that, ID3 is the most crucial document and the plaintiff is relying on this document to prove his claim.

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[11] It cannot be denied that during the trial, the plaintiff has referred to an email, ID3, the document which was marked as ID. It is so because the maker of this document was not called as a witness. But oral evidence was led by counsel for the plaintiff with regard to this document. The question is, without proving the content of the document ('ID3') can the oral evidence be admitted in evidence?

[12] In *Allied Bank (Malaysia) Bhd v Yau Jiok Hua* [1998] 6 MLJ 1; [1998] 2 CLJ 33 at p 14 (MLJ); p 46 (CLJ), states that:

> It is settled law that where a document is sought to be proved in order to establish the truth of the facts contained in it, the maker has to be called (see *R v Gillespie* (1967) 51 Cr App R 172; *R v Plumer* [1814] Russ & Ry 264; *Hill v Baxter* [1958] 1 QB 277; *R v Moghal* [1977] Crim LR 373). Non compliance with this rule will result in the contents of the documents being hearsay. The evidential effect of a document which has not been properly proved was described by Abdoolcader J (as he than was) in *Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180; [1977] 1 LNS 92 at p 183 in the following terse terms:
>
> > It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case, namely, D41 and D43 which were both put in for identification only … As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto …

[13] PW, that is the plaintiff himself testified in examination–in–chief that:

> ... by a letter dated 23.5.2002 (P2) Bank of America disclosed that the 1st Defendant has an email address as Alison@iscbwp.po.my and upon the same being checked by my accountant, it was discovered that it was the 1st Defendant's email address provided by 2nd Defendant as an employee.
>
> …
>
> I have many Chinese customers who patronize my restaurant. One of them was Mr. Teh Yoong Yang and Cheang Hung Kok … After having their lunch, Mr Teh Yoong Yang paid the bill and gave me a copy of an email address to him and Mr. Cheang Hung Kok. He (Mr. Teh Yoong Yang) told me that the emails sent to his email at Bank of America. He downloaded a copy and photostatted the same to be given to me.

[14] Mr Teh Yoong Yang who gave a copy of the email which forms the subject document in the plaintiff's claim was never call as a witness.

[15] Lord Normand in *Teper v Reginam* [1952] 2 All ER 447 and Lord Reid

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in *Myers v Director of Public Prosecutions* [1964] 2 All ER 881 reminds of the dangers of relying on hearsay evidence, more so in the case of oral evidence. The rule against hearsay is generally invoked to exclude evidence as proof of a fact which has been stated by a third person who is not called as a witness and cannot be tested by cross-examination.

[16] As for the evidence of PW1, it falls foul of the rule of hearsay in so far as ID3 is concerned. It is PW1's evidence that ID3 was given to him by Mr Teh Yoong Yang who was not call to give evidence.

[17] Mr Teh Yoong Yang must be called by the plaintiff as a witness. PW1 does not have personal knowledge regarding the transactions of the said email. Thus, the evidence of Mr Teh Yoong Yang is the most important being the backbone of the plaintiff's case.

[18] There was no evidence adduced that an attempt had been made to locate Mr Teh Yoong Yang.

[19] In the premises the evidence of Mr Teh Yoong Yang is critical for the plaintiff not only to establish that ID3 was given to him but the plaintif has to prove that Mr Teh Yoong Yang is the person who downloaded it from the computer and gave it to him.

[20] It is the plaintiff's evidence that the content of the email which was given to him by Mr Teh Yoong Yang that defamed him. Further, there was no evidence adduce whether, it was the same email tendered in court.

[21] It was the defendants who challenged the truth of the content of ID3. The onus therefore was on the plaintiff to adduce evidence otherwise.

[22] The fact remained that the court at the end of the whole case, had to determine the truth of the content of ID3 and the weight to be given to it.

[23] As he is not available to give evidence on these matters, I disregard ID3 as well as the oral evidence relating to the same.

[24] Based on the decision in the case of *Allied Bank* and *Public Prosecutor v Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 180 above, this court rejected ID3 as evidence on the ground that Mr Teh Yoong Yang was not called to give evidence as such ID3 is hearsay and cannot be admitted as evidence. As such the plaintiff fails to prove that statements in ID3 are defamatory.

REFERENCE TO PLAINTIFF

[25] Assuming the plaintiff has shown that the statements bear some sort of

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defamatory imputation, he must then proceed to establish that the defamatory statements or remarks in question were published of and concerning him. The statements must be capable of referring to the plaintiff or of identifying him.

[26] On this point, the House of Lords in the case of *Knupffer v London Express Newspaper, Limited* [1944] AC 116 has this to say:

> It is an essential element of the cause of action for defamation that the words complained of should be punished of the plaintiff, where he is not named the test of this is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so in fact does not arise if they cannot in law be regarded as capable of referring to him.

[27] In the case of *Institute of Commercial Management United Kingdom v New Straits Times Press (Malaysia) Bhd* [1993] 1 MLJ 408, His Lordship Lim Beng Choon J has held:

> It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. The test which the plaintiff has to furnish an answer to satisfy the court is whether the words would reasonably in the circumstances lead persons acquainted with the plaintiff to believe that he was the person referred to.

[28] In the present case, I hold that ID3 is inadmissible as evidence. That being the case, there is no evidence to show that the said ID3 was meant to refer to the PW1 or the plaintiff.

PUBLICATION TO A THIRD PERSON

[29] The final element that the plaintiff must prove is that the statements of which he complains have been published to any third party by the defendants. As stated by Lord Esher MR in the case of *Hebditch v Macilwaine and others* [1894] 2 QB 54 (at p 58):

> The material part of the cause of action in libel is not the writing, but the publication of the libel.

[30] Publication means making defamatory matter known to some person other than of whom it is written or spoken. In the case of *S Pakianathan v Jenni Ibrahim* [1988] 2 MLJ 173 at p 176; [1988] 1 CLJ 771 at p 776; [1988] 1 CLJ 233 at p 238, the court held that:

> In order to constitute publication, the defamation matter must be published to a third party, and not simply to the plaintiff. By publication it is meant the making known of defamatory matter after it has been written to some person other than the

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person of whom it is written. The uttering of a libel to the party libeled is no publication for the purpose of civil action, (citing *Wennhak v Morgan* [1888] 20 QBD 635).

[31] In *Gatley On Libel and Slander*, (9th Ed) at p 134, the same principle is reiterated as follows:

> The fundamental principle is that the matter must be communicated to a third party in such manner as to be capable of conveying the defamatory imputation about the plaintiff.

[32] ID3 did not contain any information who was the sender. The only information stated in the email is the identity of the recipient, Mr Teh Yoong Yang and Mr Cheah Hung Kok and that it was forwarded by one Joanne Oh on 5 November 2001. In the absence of any marks on the email to identify its sender, it was therefore critical for the plaintiff to prove that the first defendant did in fact send the email.

[33] The letter dated 23 May 2002 (exh COC4 in P11) was a letter from Bank of America revealing the alleged email address Alison@iscbwp.po.mv was the email address of the first defendant and ID3 was sent from the said address. There was no evidence that the email that was referred in the letter dated 23 May 2002 was the same email as ID3. There was doubt as to which email that was sent out from the first defendant email address. ID3 was not admitted as evidence and in furtherance to that there was doubt who was the sender of ID3. Hence, the plaintiff fails to prove that the words of which he complains have been published to any third party by the defendants.

NEGOTIATION FOR SETTLEMENT

[34] There was evidence adduced by the plaintiff that first defendant had admitted sending email to the third party. The admission transpired during the negotiation for settlement.

[35] In *Halsbury's Laws of England*, (4th Ed) at para 212, which contains a concise digest of the law on 'without prejudice' communications, it is stated that:

> Letters written and oral communications made during a dispute between the parties, which are written or made for the purpose of settling the dispute, and which are expressed or otherwise proved to have been made 'without prejudice', cannot generally be admitted in evidence.

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[36] In the case of *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 17; [1981] 1 LNS 95, Chang Min Tat FJ in delivering the judgment of the Federal Court held as follows:

> It is settled law that letters written without prejudice are inadmissible in evidence of the negotiations attempted. This is in order not to fetter but to enlarge the scope of negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement.

[37] In *Re Jinro (HK) Limited* [2002] 4 HKC 90 the judge held that it was not necessary for a 'without prejudice' stamp to be expressly applied to the negotiations if it was clear from the surrounding circumstances that the parties were genuinely seeking to compromise the dispute. It was stated in that case that a party claiming without prejudice privilege on communication would have to show that the communication was made: (i) at a time when there was an existing dispute between the parties; (ii) legal proceedings in relation to the dispute had commenced or were contemplated; (iii) the communication was made in a genuine attempt to settle the dispute; the communication was made with the intent that if negotiations failed, it could not be disclosed without the parties consent.

[38] In the case of *Cuffs v Head and another* [1984] 1 All ER 597, the Court of Appeal discussed the 'without prejudice rule' and stated it as follows:

> That the rule rests, at least in part, on public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course as much the failure to reply to an offer as an actual offer) may be used to their prejudice in the course of the proceedings.

[39] Further, the plaintiff sought to rely on the 'without prejudice' letters which were exhibited as P4 and P5 in support of the argument that there was an admission by the first defendant sending the said email to the third party. From these two letters it can be seen that parties are speaking and negotiating freely about all issues related to the terms of settlement.

[40] However my view on this is that, the said two letters are a 'without prejudice' letter. It is pertinent to note that parties often make statement 'without prejudice' as part of an attempt to settle a dispute. When this is done, the contents of the statement cannot be put in evidence without the express

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consent of both parties. The statements often relate to the offer of a settlement and, were it not for the privilege, they would constitute significant items of evidence on the ground that they were admissions. It is in the public interest that disputes are encouraged to be settled to reduce litigation to a minimum. The policy of the law has been in favour of enlarging the cloak under which negotiations may be concluded without prejudice.

[41] The alleged admission by the first defendant which the plaintiff intends to rely on was made during the negotiation for settlement of the dispute and that though they are not labeled 'without prejudice' but nevertheless they were intended to be on a 'without prejudice' basis. This is so stated in the evidence of the plaintiff. The negotiations were aborted after the parties failed to reach a settlement. The negotiation statement made by the plaintiff, was not challenged, hence must be taken to be true.

[42] See *Oh Kuang Liang v Associated Wood Ind Sdn Bhd* [1995] 4 MLJ 390; [1995] 2 CLJ 961 and *EON Bank Berhad v Cepad Group Sdn Bhd & Ors* [2006] 4 MLJ 362; [2006] 1 LNS 246 which applied the same principle.

[43] The plaintiff in relation to the ongoing negotiation for settlement fortify the fact that negotiation was made on a without prejudice basis and is therefore privileged.

CONCLUSION

[44] There are three elements to be proved by the plaintiff to an action of defamation, failing which it cannot be said that the statements are defamatory to the plaintiff.

[45] Abdul Wahab Patail J (now JCA) in the case *Subramaniam a/l Paramasivam v Courts Mammoth Bhd & Anor* [2010] 9 MLJ 363; [2010] 1 LNS 904, states as follows:

> There are three initial elements to an action in defamation. The first is whether the words by their natural and ordinary meaning (see *Chong Swee Huat & Anor v Lim Shian Ghee (t/a L&G Consultants & Education Services)* [2009] 3 MLJ 665 (CA); [2009] 4 CLJ 113 (CA)) or by innuendo (*Rajagopal v Rajan* [1972] 1 MLJ 45; [1971] 1 LNS 117 (FC); *Luk Kui Lam v Sim Ai Leng* [1972] 1 MLJ 214; [1978] 1 LNS 110 (FC) is capable of being defamatory. The second is whether the words refer to the plaintiff. The third is whether the words were published to a third party. See *Henry Ong Keng Sem v Patrick Ong King Kok* [2008] 7 MLJ 569; [2008] 4 CLJ 276; *Ismail bin Shamsudin v Abdul Aziz bin Abdan and other suits* [2007] 3 MLJ 512; [2007] 8 CLJ 65; *Kian Lup Construction v Hongkong Bank Malaysia Bhd* [2002] 7 MLJ 283; [2002] 7 CLJ 32. Only if these elements are established, then it can be

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said that prima facie the words are defamatory of the plaintiff. Only then would it become necessary to consider the defences and the plaintiffs answers thereto.

[46] Therefore on a balance of probabilities, from all the evidence presented in court, I found that all the three elements are not established to prove that prima facie statements are defamatory of the plaintiff. Therefore it is not necessary for this court to consider the defences by both defendants.

[47] On the above considerations, the court holds that the plaintiff has failed to establish his claim against both defendants and therefore the plaintiff's claim is dismissed with costs.

Calim dismissed with costs.

Reported by Ashok Kumar